

§ 78.19

(1) A party files objections with the Environmental Appeals Board pursuant to § 78.20(a) of this part, or

(2) The Environmental Appeals Board *sua sponte* files a notice that it will review the decision under § 78.20(b) of this part.

[58 FR 3760, Jan. 11, 1993, as amended at 62 FR 55488, Oct. 24, 1997]

§ 78.19 Interlocutory appeal.

(a) Interlocutory appeal from orders or rulings of the Presiding Officer made during the course of a proceeding may be taken if the Presiding Officer certifies those orders or rulings to the Environmental Appeals Board for interlocutory appeal on the record. Any requests to the Presiding Officer to certify an interlocutory appeal shall be filed within 10 days of notice of the order or ruling and shall state briefly the grounds for the request.

(b)(1) Within 15 days of the filing of any request for interlocutory appeal, the Presiding Officer may certify an order or ruling for interlocutory appeal to the Environmental Appeals Board if:

(i) The order or ruling involves an important question on which there is substantial ground for difference of opinion, and

(ii) Either:

(A) An immediate appeal of the order or ruling will materially advance the ultimate completion of the proceeding, or

(B) A review after the proceeding is completed will be inadequate or ineffective.

(2) If the Presiding Officer takes no action within 15 days of the filing of a request for interlocutory appeal, the request shall be automatically dismissed without prejudice.

(c) If the Presiding Officer grants certification, the Environmental Appeals Board may accept or decline the interlocutory appeal within 30 days of certification. If the Environmental Appeals Board decides that certification was improperly granted, it will decline to hear the interlocutory appeal. If the Environmental Appeals Board takes no action within 30 days of certification, the interlocutory appeal shall be automatically dismissed without prejudice.

(d) If the Presiding Officer declines to certify an order or ruling for an inter-

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locutory appeal, the order or ruling may be reviewed by the Environmental Appeals Board only upon an appeal of the proposed decision following completion of the proceedings before the Presiding Officer, except when the Environmental Appeals Board determines, upon motion of a party and in exceptional circumstances, that to delay review would not be in the public interest. Such motion shall be filed with Environmental Appeals Board within 5 days after the earlier of automatic dismissal of the request for interlocutory appeal or receipt by the party of notification that the Presiding Officer declines to certify an order or ruling for interlocutory appeal.

(e) The failure of a party to request an interlocutory appeal shall not prevent an appeal of an order or ruling as part of an appeal of a proposed decision under § 78.20 of this part.

§ 78.20 Appeal of decision of Administrator or proposed decision to the Environmental Appeals Board.

(a) Within 30 days after the issuance of a proposed decision by a Presiding Officer under this part, any party may appeal any matter set forth in the proposed decision, or any other order or ruling made during the proceeding to which the party objected during the proceeding before the Presiding Officer, by filing an objection with the Environmental Appeals Board. On appeal of an order, ruling, or proposed decision of a Presiding Officer:

(1) The party filing the objection shall have the burden of going forward to show that the order, ruling, or proposed decision is based on a finding of fact or conclusion of law that is clearly erroneous; or a policy determination or exercise of discretion that is arbitrary and capricious or otherwise warrants review; and

(2) The petitioner or the owners and operators shall have the burden of persuasion, as set forth in § 78.12(a) (1) and (2) of this part.

(b) Within 45 days (or other shorter, reasonable period established by the Environmental Appeals Board) after issuance of a proposed decision of a Presiding Officer, the Environmental Appeals Board may issue *sua sponte* in

its discretion a notice of intent to review such proposed decision. The Environmental Appeals Board will serve such notice upon all parties to the proceeding.

(c) Within a reasonable time following the filing of a petition for administrative review of a decision of the Administrator under § 78.3 of this part, or, if any issues raised by such petition are referred to the Presiding Officer, the filing of objections under paragraph (a) of this section or the issuance of a notice of intent to review under paragraph (b) of this section, the Environmental Appeals Board will issue an order affirming, reversing, modifying, or remanding the decision or proposed decision, as appropriate. Prior to issuing this order, the Environmental Appeals Board may provide an opportunity for parties to file additional briefs.

(d) If the Environmental Appeals Board issues an order affirming, reversing, or modifying the decision of the Administrator, then the decision as supplemented or changed by the order, shall be final agency action.

(e) If the Environmental Appeals Board issues an order affirming, reversing, or modifying the proposed decision, the proposed decision, as supplemented or changed by the order, shall be final agency action.

(f) If the Environmental Appeals Board issues an order remanding the proceeding, then final agency action occurs upon completion of the remanded proceeding, including any appeals to the Environmental Appeals Board in the remanded proceeding.

[58 FR 3760, Jan. 11, 1993, as amended at 62 FR 55488, Oct. 24, 1997]

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